Holloway Ready Mix Co., Inc. *and* Richard B. Seibert. Cases 9–CA–25849 and 9–CA–26282

November 29, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On April 24, 1991, Administrative Law Judge Richard A. Scully issued the attached decision. The General Counsel has filed exceptions and a supporting brief,[1] and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the briefs[2] and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Holloway Ready Mix Co., Inc., Middletown, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Remove from its files any reference to Richard B. Seibert's unlawful layoff and notify him in writing that this has been done and that the layoff will not be used against him in any way.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off our employees because they join General Drivers, Warehousemen and Helpers of America, Local Union No. 89, affiliated with the International Brotherhood of Teamsters, AFL–CIO in order to obtain the benefits available to regular drivers under our collective-bargaining agreement with the Union or refuse to recognize their rights to such benefits.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Richard B. Seibert whole for any loss of earnings or benefits suffered as a result of our having unlawfully laid him off on September 27, 1988, and/or as a result of our failure to recognize his status as a regular driver after that date, with interest.

WE WILL remove from our files any reference to Richard B. Seibert's unlawful layoff and notify him in writing that this has been done and that evidence of the layoff will not be used against him in any way.

HOLLOWAY READY MIX CO., INC.

[1] No exceptions were filed to the judge's finding in Case 9–CA–25849 that the Respondent violated Sec. 8(a)(3) of the Act by laying off employee Richard B. Seibert on September 27, 1988.

The General Counsel has excepted to the judge's failure to find in Case 9–CA–26280 that the 1-week layoff of Seibert on March 15, 1989, was unlawful because he refused to sign a waiver extending his probationary period on that date (Seibert had been recalled to work by the Respondent after the layoff which led him to file the charge in Case 9–CA–25849 and afterwards had been treated as a casual driver). Although the judge did not make a specific finding that Seibert's March 15 layoff was unlawful, we find that in effect he made such a finding. Thus, he deemed the Respondent's failure to treat Seibert as a regular driver at any time after his recall from the unlawful September 27, 1988 layoff through his lawful termination on July 10, 1989, to be a further manifestation of that unlawful layoff. In this regard the judge, inter alia, distinguished the two instant cases and Seibert's situation in both from those of the other employees in Case 9–CA–26282, on the basis that they did not, as Seibert did, meet the contractual requirement for becoming a regular driver; and he found that Seibert, because of his regular driver status, was entitled to receive all the contractual benefits the Respondent provides its regular drivers from September 27, 1988, to the end of his employment with the Respondent. Indeed, the judge specifically provided that the make-whole remedy and his recommended Order would include reimbursement for Seibert for any earnings or benefits he lost by virtue of the Respondent's treating him as a casual driver after September 27. This would include his March 15 layoff. Finally, in his conclusions of law the judge concluded that the Respondent violated Sec. 8(a)(3) and (1) by laying Seibert off on September 27, 1988, and by failing and refusing to recognize him as a regular driver and provide him with the contractual benefits to which such employees were entitled.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Engrid E. Vaughan, Esq., for the General Counsel.
R. Daniel Craven, Esq., of Greenwood, Indiana, and *Joseph A. Worthington, Esq.*, of Louisville, Kentucky, for the Respondent.

DECISION

RICHARD A. SCULLY, Administrative Law Judge. On a charge filed on October 14, 1988, by Richard B. Seibert, the Regional Director for Region 9 of the National Labor Relations Board (the Board) issued a complaint in Case 9–CA–25849 on November 17, 1988, alleging that Holloway Ready Mix Co., Inc. (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by laying off the Charging Party. On a charge filed by Richard B. Seibert on March 21, 1989, the Regional Director issued a complaint in Case 9–CA–26282 on April 17, 1989, alleging that the Respondent had committed violations of Section 8(a)(1) and (3) of the Act. The Respondent has filed timely answers to the complaints denying that it has committed any violations of the Act.

A hearing in Case 9–CA–25849 was held in Louisville, Kentucky, on February 22, 1989, at which the parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. After the complaint in Case 9–CA–26282 was issued, counsel for the General Counsel filed a motion seeking to reopen the record and consolidate the two cases which the Respondent opposed. An order was entered on May 10, 1989, granting the motion to consolidate the cases. Thereafter, another charge was filed and the scheduled hearing was postponed to permit investigation of that charge. A hearing on Case 9–CA–26282 was held in Louisville, Kentucky, on January 17, 1990. Briefs submitted on behalf of the parties in both cases have been given due consideration. On the entire record and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was a corporation with an office and place of business in Middletown, Kentucky, engaged in the manufacture and sale of ready-mixed concrete to commercial customers. During the 12-month period preceding November 1988, a representative period, the Respondent, in the course and conduct of its business operations, sold and shipped goods, materials, and products valued in excess of $50,000 to firms located in the Commonwealth of Kentucky, each of which during the same period sold and shipped goods, materials, and products valued in excess of $50,000 directly to customers located outside the Commonwealth of Kentucky. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all times material General Drivers, Warehousemen and Helpers of America, Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union) was a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent's cement truckdrivers have been represented by the Union for a long period. The most recent collective-bargaining agreement between the parties covers the period from July 1, 1988, to June 30, 1991. The agreement provides that the cement truckdrivers are to be classified as either ''regular'' or ''probationary'' employees. Regular drivers, also referred to as ''on the board'' drivers, must be members of the Union and they receive higher pay and certain benefits under the contract which probationary drivers, also known as ''extra'' or ''casual'' drivers, do not. The current agreement provides in article V, section 4, that a regular employee is one who has completed 45 days of employment with the company during any 90-consecutive-day period. Employees who have worked less than 45 days during a 90-consecutive-day period are probationary employees and are subject to termination during the probationary period at the sole discretion of the company. Article V, section 1, of the agreement provides that the Union and the Respondent can agree to extend the probationary period but the probationary employee must agree to the extension in writing.

The Respondent's business is a seasonal one, affected by the weather. The busy season when more drivers are required runs from around April until September or October.

B. *Case 9–CA–25849*

Richard Seibert testified that he was employed by the Respondent as a casual driver for over 2 years prior to September 1988.[1] On September 20, a Tuesday, Seibert was approached by Chuck Martin, a salesperson and agent of the Respondent, in the yard of the cement plant. Martin had a yellow legal pad with him with some names on it and told Seibert he and all the extra drivers had to sign. Martin told Seibert to sign his name and ''put 90 days behind it'' or he would be laid off. He said that all of those whose names were on the paper were laid off on Friday and were back to work now because they signed the paper. He said that there was a lot of work coming up and that unless he signed the paper Seibert would be laid off. Seibert signed and wrote 90 days by his signature. Seibert did not ask Martin any questions and was not sure what the paper he signed meant. He signed it because Martin said he had to. Seibert's testimony about this incident was credible and is uncontradicted.

Seibert testified that on the following day he was approached in the plant office by Mark Holloway who was plant manager and the son of company owner Billy Holloway. Holloway asked Seibert to sign a paper which provided that he agreed to waive his 90-day probationary period. Seibert told Holloway he would have to think about it and went out to clean his truck. About 5 minutes later Holloway came to him and they talked about signing the paper. Holloway mentioned some problems Seibert had with his driving over the past 2 years and said he really ought to sign the paper. Holloway said that Seibert had signed one the day before and this was the same thing more or less. Seibert

[1] Hereinafter, all dates involved in Case 9–CA–25849 are in 1988.

said that he did not realize what he was signing and felt foolish about it afterward. Their conversation lasted from 40 to 60 minutes and they discussed several things. Referring to the paper he asked Seibert to sign, Holloway said if Seibert did not sign it he would be laid off and that ''we can't have all these guys getting in the Union.'' Seibert responded that he did not really mind if he was laid off because he had several things to do. Seibert did not sign the paper Holloway gave him. Seibert worked the next 2 days and was told that Monday was going to be a slow day and that he was not needed.

On Monday, September 26, Seibert went to the union hall and told the assistant business agent that he had 47 days in during a 90-day period, paid his money, and joined the Union. When Seibert reported for work on Tuesday, September 27, he told Supervisor Bill James that he had joined the Union. James responded, ''Oh my gosh, it's going to hit the fan now.'' James told Seibert to call Mark Holloway before he punched in. Seibert told Holloway that he had his days in and had joined the Union. Holloway said he did not think Seibert had enough days, told him to go home and that he would check on it and call him back that night. When Seibert reported for work the next morning he was told to call Holloway before he punched in. Holloway told Seibert he only had 44 days in, that things were slowing down and he would not be needed for a while and that he should go home and check in periodically to see if he was needed. During the next few days Seibert spoke with company owner Billy Holloway in person and by telephone. He told Billy Holloway that he had enough days in to get on the board and had joined the Union but ''they didn't seem to want to put me on the board.'' Holloway said he would check on it and get back to Seibert, but never did so. Seibert was not called back to work until November 11 after he had filed a charge with the Board.

Mark Holloway testified that it was the company practice that when casual drivers came close to meeting the 45-day requirement for getting on the board as regular drivers they were either laid off or the Respondent had them extend their probationary period. He said that he was aware that several drivers were nearing the 45-day mark in September, but that he did not direct Chuck Martin to tell the casual drivers they had to extend their probationary periods or be laid off and did not tell him to have the drivers sign anything. In a pretrial affidavit Holloway gave the Board, he stated that he did tell Martin to have the drivers sign something to extend their probationary periods or they would be laid off. Holloway testified that he did ask Seibert to sign a document waiving his probationary period. While Holloway seemed confused as to what the actual effect of the document was, it was clear that his purpose in getting Seibert to sign was ''to keep him from getting on the board.'' He also said that it did not matter to him if Seibert became a member of the Union. Holloway testified that it is the company's general practice to lay casual drivers off to keep them from getting on the board as regular drivers. In September, this policy was applied and it was his intent to lay off any casual driver who did not sign a waiver. Seibert was the only driver who refused to sign a waiver and those drivers who did sign were not laid off. Holloway testified that after Seibert refused to sign the waiver he learned that Seibert had joined the Union, that when he learned of this he decided to lay Seibert off and that he would not have laid him off if he had not joined the Union.

Analysis and Conclusions

There is no allegation in Case 9–CA–25849 that the Respondent violated the Act by soliciting waivers of the probationary period from its casual drivers under threat of layoff if they did not execute such waivers. The only violation alleged relates to the Respondent's action in laying off Richard Seibert after he joined the Union. The evidence in the record, consisting of Seibert's testimony and timecards, establishes that Seibert had met the contractual requirements for becoming a regular driver by working at least 45 days during a 90-day period. There is no evidence to the contrary. Once he got his 45 days in, Seibert joined the Union.

The evidence, which includes the testimonial admissions of Mark Holloway, is clear that Seibert was not laid off because he refused to sign a waiver or agreement to extend his probationary period. He was laid off because, having met the requirements for becoming a regular driver, he took the step necessary to qualify him for the additional benefits available to regular drivers—joining the Union. In other words, because he joined the Union, Seibert was laid off by the Respondent. Seibert was the only casual driver laid off at the time and the Respondent offered no evidence to establish that there was no work available when he was laid off. Accordingly, I find that Seibert's layoff was discriminatory. The General Counsel need not make an actual showing that the Respondent's action encouraged or discouraged union membership in order to establish a violation of Section 8(a)(3). It is enough that ''encouragement or discouragement can be reasonably inferred from the nature of the discrimination.'' *Radio Officers v. NLRB*, 347 U.S. 17, 51 (1954). That is the case here where Seibert's joining the Union directly and immediately resulted in his loss of employment.

There is also the question of the Respondent's motivation in laying off Seibert. The Respondent and the Union have had a long and presumably amicable relationship. There was no evidence of animus on the Respondent's part and I believed Mark Holloway's testimony that it ''didn't matter'' to him whether or not Seibert was in the Union. His concern was to avoid paying the additional benefits to which Seibert's status as a regular or on the board driver who was a member of the Union entitled him. But those benefits were exactly what the Respondent had agreed to provide its regular drivers when it entered into the collective-bargaining agreement which became effective on July 1, 1988. It was also in this agreement that the Respondent agreed to reduce the number of days needed to become a regular driver from 60 to 45. I find that the Respondent's action in discriminatorily laying off Seibert because he joined the Union in order to take advantage of the contract provisions to which the Respondent had agreed was inherently destructive of employees' rights; consequently, no proof of antiunion motivation is necessary to establish a violation of Section 8(a)(3). *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33–34 (1967). It is clear that Seibert was deprived of employment solely because he joined the Union, an action which clearly served to discourage membership in the Union. *Henry Vogt Machine Co.*, 251 NLRB 363, 364 (1980). Further, under the circumstances, the Respondent's desire to

avoid paying Seibert these benefits cannot constitute legitimate and substantial business justification for its action.

C. *Case 9–CA–26282*

1. Section 8(a)(3)

The complaint in Case 9–CA–26282 alleges that the Respondent violated Section 8(a)(3) of the Act by requiring its casual drivers to sign waivers extending their probationary periods in March 1989,[2] in order to prevent them ''from becoming members of the Union and from receiving 'union benefits' as provided for by the contract.'' It also alleges that it violated the Act by laying off Richard Seibert on March 15 because he refused to waive his rights under the contract. At the hearing the complaint was amended to allege that the Respondent, acting through Mark Holloway, in June threatened its employees with plant closure if they joined the Union.

Richard Seibert testified that he was called back to work as a casual driver after the layoff which led to the filing of his charge in Case 9–CA–25849. On the morning of March 15 he was approached by dispatcher Donny Reynolds who asked him to sign a paper similar to that Mark Holloway had previously asked him to sign, extending his probationary period. Seibert refused to sign. Later the same day Reynolds again asked Seibert to sign the waiver and said if he did not sign he would be laid off. Seibert refused to sign the waiver and was laid off for a week.

Johnny Parker testified that he was employed by the Respondent as a casual driver from June 1987 until September 1989. In March, he was asked by Mark Holloway to sign a waiver of his probationary period. It was the second time he had been asked to execute such a waiver. Holloway told Parker that he had to sign the waiver or he would be laid off. Parker signed and was not laid off.

Richard Sanders has been employed by the Respondent as a casual driver since June 1988. On March 15, Sanders was given a waiver form to sign by dispatcher Reynolds who told him he needed to sign it to continue to work. Reynolds told him he would be laid off if he did not sign the waiver. Sanders signed the waiver as he had done on one previous occasion.

Mark Holloway testified that in March he instructed Reynolds to obtain waivers from those casual drivers who were near getting in 45 days out of a 90-day period. Reynolds was responsible for keeping track of the days the drivers had in. In addition to Parker and Sanders, Reynolds obtained waivers from three other casual drivers. The purpose of the waivers was to start the 90-day probationary period over again.

Analysis and Conclusions

The uncontradicted credible testimony of Seibert, Parker and Sanders and the testimonial admissions of Mark Holloway clearly establish that in March the Respondent required those casual drivers who were nearing the point of getting in 45 days of work during a 90-day period to sign papers whereby they waived the days of work they had in and started their probationary period over. They were required to sign these waivers under threat of being laid off if they did not do so. There is no evidence that any of the casual drivers who were required to sign the waivers had already worked at least 45 days during the then-current 90-day period, thereby meeting the contractual requirement for becoming a regular or on the board driver.[3] It is this fact which distinguishes this case from the first discussed herein.

There is ample uncontradicted evidence in the record that because of the seasonal nature of its business it had long been the Respondent's practice, and that of other employers similarly situated, to employ both regular and casual drivers. The former received certain benefits under the collective-bargaining agreement with the Union that the latter did not. The agreement specifically provides that casual drivers have to serve a probationary period and that during that probationary period they are subject to termination ''at the sole discretion of the company.'' The agreement also provides that casual employees can agree to extend the probationary period in a written document. It had apparently been unnecessary to extend the probationary period of casual drivers under previous contracts which required them to work 60 out of 90 days in order to complete the probationary period. There is no evidence that the Respondent's practice of employing regular and casual drivers or its agreement to the foregoing contractual provisions concerning casual drivers was motivated by union animus or a desire to undermine the Union's position as the bargaining representative of its employees. The fact that these provision are incorporated into the collective-bargaining contract agreed to by the Union indicates that they were based on sound business reasons and were intended to allow the Respondent the flexibility needed to operate effectively in a competitive, seasonal business.

Counsel for the General Counsel does not contend that the probationary period provision is illegal. Under that provision the Respondent could have terminated all of its casual drivers in order to prevent them from becoming regular drivers and thereby avoid the higher costs that the increased benefits regular drivers received would have engendered. The contention is that by giving the casual drivers the option to extend the probationary period under threat of layoff or termination, the Respondent unlawfully coerced those employees to prevent them from ''joining the Union or enforcing applicable contractual provisions,'' citing *Interboro Contractors*, 157 NLRB 1295 (1966). I do not agree. There is no evidence that the Respondent's actions were motivated by union animus. The credible testimony of Mark Holloway convinces me it was of no concern to the Respondent whether any casual driver was a member of the Union or not. There is no evidence that union membership, activity, or sympathy had any bearing on the Respondent's efforts to obtain probationary period extensions from the casual drivers. The only thing that mattered was whether or not a driver was nearing the point of completing his probationary period and qualifying to be a regular driver. Consequently, I find that the General Counsel has not established that the Respondent's action in obtaining waivers or extensions of the probationary period from its employees was unlawfully motivated or done in a discrimi-

[2] Hereinafter, all dates involved in Case 9–CA–26282 are in 1989 unless otherwise indicated.

[3] I have previously found that Richard Seibert had met the contractual requirements for becoming a regular driver and was entitled to all benefits provided such drivers under the contract beginning on September 27, 1988. The make-whole remedy provided in Case 9–CA–25849 would include reimbursement for any work lost by virtue of his being treated as a casual driver after that date.

natory manner or in reprisal for union or other protected activity on the part of its employees. I also find no evidence that these employees were coercively prevented from enforcing any contractual provision. Until a casual driver completed his probationary period he was not entitled to any of the rights or benefits enjoyed by regular drivers. Since a casual driver could be terminated without cause during his probationary period, he was not deprived of anything he was entitled to under the contract by being asked to extend his probationary period. On the contrary, in return for his agreement to extend that period he was given the opportunity to continue his employment which would otherwise have been terminated. I find the Respondent's action in seeking extensions of the probationary period from its casual drivers in March 1989, was consistent with its legitimate economic interests and its rights under the collective-bargaining agreement and did not violate the Act. *Airport Aviation Services*, 292 NLRB 823 (1989).

2. Section 8(a)(1)

During June 1989, a meeting of the Respondent's drivers was called by Woody Wilson, a driver and union steward. Attendance at the meeting was optional, but many drivers attended. Mark Holloway was also present. The General Counsel alleges that at the meeting Wilson told the employees of a threat by company owner Billy Holloway to close the business if anyone went down and joined the Union and that Mark Holloway confirmed Wilson's statement concerning his father's threat.

Richard Sanders testified that he attended the meeting which was intended to improve relations between the company and the employees. Wilson did most of the talking. During the meeting there was a discussion about joining the Union. Sanders testified that Wilson said that he had talked to Billy Holloway and that Holloway said he ''would shut the plant down if anybody got in the Union, if anybody else joined the Union.'' Mark Holloway said ''yes, that he would shut the plant down.'' On cross-examination Sanders said that the reference to closing the plant struck in his mind, but that he did not clearly remember everything that was said as there was a lot going on that morning.

James Smith testified that he attended the meeting and heard Wilson say that they had a full board at that time, that there was not going to be anyone else in the Unions and that if the drivers went and joined the Union ''they would just close out.'' Smith did not recall Mark Holloway making any comment about what Wilson had said.

Mark Holloway testified that at the meeting Wilson told the drivers that he had talked to Billy Holloway and that if another driver was to get on the board he would shut the plant down. Wilson said that in order to be competitive the Company could not afford to have another person or group go on the board. Holloway testified that he told the drivers he agreed with what Wilson said about the Company not being able to afford having more drivers on the board. He did not threaten to close the plant if the drivers chose to join the Union.

I found Mark Holloway's testimony to be more credible as to what was actually said at the June 1989 meeting than that of either Sanders or Smith, particularly, as to what he said at the meeting. Neither of the employee witnesses seemed to have a clear memory of what was actually said and appeared to be giving their interpretation of what they heard. I find that Holloway did not make or ratify any threat by Wilson that the Respondent would close the plant if any of its employees joined the Union. Holloway's statement at the meeting that the Company could not afford to have more employees on the board at that time cannot, in context, be equated with a threat to close the plant if employees joined the Union. Whether an employee joined the Union or not would have any impact on the Respondent unless that employee were on the board and entitled to the increased benefits union members who were on the board received. I find that Holloway did nothing more than lawfully explain that the Respondent could not afford to have more employees on the board at that time and remain competitive. His statement did not purport to be a threat of plant closure if employees joined the Union or to ratify any such threat conveyed by Wilson. I shall recommend that the complaint in Case 9–CA–26282 be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Respondent, Holloway Ready Mix Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by laying off Richard Seibert on September 27, 1988, because he had joined the Union and by failing and refusing to recognize him as a regular employee and provide him with the contractual benefits to which such employees were entitled.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not commit any violation of the Act alleged in the complaint in Case 9–CA–26282.

THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off Richard Seibert on September 27, 1988, and by refusing to recognize him as a regular employee and provide him with the contractual benefits to which he was entitled as a regular employee during the remainder of his employment with it,[4] I shall recommend that the Respondent be required to make him whole for any loss of earnings and/or benefits suffered by reason of the discrimination against him, including any loss of work resulting from the fact that the Respondent treated him as a casual instead of a regular driver. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[4] The evidence indicates that after September 27, 1988, Seibert was recalled to work as a casual employee and continued to work in such status until July 10, 1989, when he was terminated for reasons unrelated to any protected activity on his part.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Holloway Ready Mix Company, Inc., Middletown, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off employees because they join the Union in order to take advantage of contractual benefits available to regular drivers who are members of the Union and refusing to recognize them as regular drivers.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Richard B. Seibert for any loss of earnings and/or benefits he may have suffered as a result of being laid off on September 27, 1988, and the Respondent's refusal and failure thereafter to recognize him as a regular driver. Backpay or other compensation and interest due hereunder shall be computed in the manner described in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Middletown, Kentucky facilities, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint in Case 9–CA–26282 is dismissed in its entirety.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''